138 (4)

No. 08-1098

FILED
MAY 12 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

RICHARD MADSEN and NANCY MADSEN,

Petitioners,

vs.

JP MORGAN CHASE BANK, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Utah

PETITIONERS' REPLY BRIEF

ROBERT J. DEBRY
Counsel of Record
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, UT 84107
(801) 262-8915

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

GRANTING CERTIORARI IN THIS CASE WILL SAVE THOUSANDS OR EVEN MILLIONS OF HOURS OF JUDICIAL TIME

Petitioners' (Madsens) core argument is that:

> [C]ertiorari should be granted, so that this Court can give a *stern warning* to lawyers and judges . . . that issues of federal preemption should be heard in the beginning of a case; and not delayed until the *middle* or the *end* of the case.

Petition for Writ of Certiorari at p. 7. (Emphasis in original.)

Prudential's response to the above was simply that:

> However, the desire to give "lawyers and judges" a "stern warning" about the timing of issues in a case is not a "compelling reason[ ]" to grant certiorari.

Brief in Opposition at p. 6.

It is respectfully suggested that the "compelling reason" to grant certiorari is to **save thousands or even millions of hours of judicial time**.

Of course, the instant case is a perfect example. It took **34** years for the Utah courts to make a dispositive ruling on federal preemption. How many other cases out there are 2, or 5, or 8, or 10, or 15

years old; where the trial court judge is holding preemption issues in the background? [1]

Next Prudential tries to argue that the issue of federal preemption was never really delayed. In support of that argument, Prudential gives a *vague reference* to a couple of occasions, over the **34** year history of this case, where the words "federal preemption" were used.

In response to this argument, Madsens refer the Court to footnote 3 (at pp. 7-8) of the original *Petition for Writ of Certiorari*:

> Petitioner is *not* asking this Court to rule on *why* issues of federal preemption were delayed for **34** years in this case. (However, petitioner believes Utah courts did not use the "tools" mentioned in fn. 2 above.) Rather, petitioner simply seeks a ruling that the Utah Supreme Court's *ultimate* decision on federal preemption, after **34** years, was incorrect. But certiorari would also give this Court an opportunity to warn about delays, in general, where federal preemption is an issue. And certiorari would give this Court an opportunity to encourage lower courts to use tools *they already have* to push federal

---

[1] Prudential also argues that there is no "compelling reason" to grant certiorari because the federal regulation at issue in this case (12 C.F.R. § 545.6-11) has since been amended. But again, this case is not about the *substance* of 12 C.F.R. § 545.6-11. This case is about *why* issues of federal preemption were sidestepped or delayed for **34** years.

> preemption to the forefront of the litigation. (See fn. 2 above.)

(Emphasis in original.)

In point of fact, the record in this case is over 14,500 pages long. It would be an interesting and exhaustive academic journey to pinpoint exactly *where* or *how* issues of federal preemption were delayed or sidestepped.

But it is not necessary to prove *when* or *how* or even *if* the issue of federal preemption was delayed. It is enough to say that *maybe*, or even *probably*, the lower court sidestepped issues of federal preemption during the **34** year saga. Therefore this Court should correct the ultimate ruling of the Utah Supreme Court on preemption; and at the same time, this Court can warn lower courts not to delay or sidestep issues of federal preemption.

PRUDENTIAL CONTINUES TO IGNORE THE PLAIN RULING OF THE TENTH CIRCUIT

Madsens' *Petition for Writ of Certiorari* is based in part on a conflict between the Utah Supreme Court and the Tenth Circuit Court of Appeals. Specifically, at page 8 of the *Petition*, Madsens argued:

> The conflict is obvious. In *Madsen II*, the Tenth Circuit Court of Appeals concluded that there *was* a contract . . . However, in

> *Madsen IV*, the Utah Supreme Court concluded that there was *no* contract . . .

(Emphasis in original.)

In response, Prudential argued at p. 11 of its *Brief in Opposition* that:

> [T]he Tenth Circuit in *Madsen II* did not hold that a contract to pay interest existed . . .

However, the language of the Tenth Circuit on the contract issue was clear and specific:

> Here the basic issue in the Madsens' complaint is whether *the contract between the Madsens and Prudential* requires the payment of profits or interest on escrowed funds.

Madsen v. Prudential Sav. & Loan Ass'n, 635 F.2d 797, 801 (10th Cir. 1980). (See App. E9 to *Petition for Writ of Certiorari*.) (Emphasis added.)

In summary, the Utah Supreme Court has attempted to overrule the Tenth Circuit Court of Appeals *in this very case*.

Respectfully submitted,

ROBERT J. DEBRY
Counsel of Record
ROBERT J. DEBRY & ASSOCIATES
4252 South 700 East
Salt Lake City, UT 84107
(801) 262-8915

Attorney for Petitioners